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ABSTRACT

A presentation by law students reviews litigation and legislation concerning the rights of handicapped children to appropriate education. Separate sections deal with the Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, and the Mills v. D.C. Board of Education suits. The implementation status of the Mills decision is discussed up to the appointment in 1975 of a Special Master to oversee implementation. The special education statute from Louisiana is reviewed and explained to be a model law for ensuring appropriate education. (CL)

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DIFFERENT AND EQUAL: THE RIGHT TO A SPECIAL EDUCATION

presented to

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New Environments, New Challenges

9th and 10th Cycle Developmental Conference

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INTRODUCTION

> "That the education of the young has a special claim on the lawyer's attention is beyond question. In the first place, any neglect of this by a state is injurious to its constitution. A given constitution demands an education in conformity with it..."
>
> Aristotle on Education
> Book VIII, L-3

It is rather disheartening to realize that these words, written more than 2,000 years ago by the famous Greek philosopher Aristotle, might have been written today as a measure of our recognition of the educational needs of the handicapped.

In 1967, the Federal Government began to look into investigating the educational system in relation to handicapped children; this resulted in the Education of the Handicapped Act. The Bureau of Education for the Handicapped, which it created, called for states to maintain a plan for education of the handicapped, and allocated approximately $40 million for implementation of the Act.[1] Today, eight years and more than $500 million later, Congress reports that 60% of the seven million handicapped children in the country still are "not receiving the special education they require," and an added "one million school age handicapped children are receiving no education at all."[2]

In the face of these incredible statistics, the 93rd Session of Congress passed an amendment to the Education of the Handicapped Act, stating:

> "In recent years federal and state courts, state legislatures and state executives have been increasingly upholding the

> principle that these (handicapped) children are legally and morally entitled to a free, appropriate public education. It is to this end that this amendment is addressed. For it establishes for the first time in Federal policy that handicapped children are entitled to an appropriate free public education." [3]

This presentation will focus on two court decisions which have influenced the kind of legislative enactments -- at both federal and state levels -- typified by the amendment to the Education Act; the decision in Mills v. Board of Education[4], and that in Pennsylvania Association for Retarded Children v. Pennsylvania[5]. Both of these cases, decided in 1972, offer guidelines to other courts, legislatures, and to advocates for handicapped children in their efforts to guarantee the right to a special education.

In addition to an analysis of these court cases and a study of the aftermath of the Mills decision, we have offered for your information a model education statute from the state of Louisiana. As part of our preparation of this paper, we found that state statutes are continually being revised; many now confirm the right of handicapped children (or exceptional children) to be educated to the "maximum of their capabilities[6]," "in accord with their abilities and capacities[7]," and "to enable them to live normal competitive lives[8]."

But we cannot depend solely on the progress of such legislatures; we need the full force and support of the education community,

parents and concerned citizens. As Harold Howe, II, then U.S. Commissioner of Education declared on the first anniversary of the creation of the Bureau of Education for the Handicapped:

> "Our commitment to universal education carries no conditions. We do not say a child is entitled to quality education except if he is poor, or except if he is mentally retarded or deaf. The phrase 'all men are created equal' can only mean that 'all men should have equal opportunity.'" 9

The forceful and endless struggles of countless parents on behalf of their children have encouraged federal court recognition of the constitutional right to an education. This constitutional doctrine (technically referred to as due process and/or equal protection) is perhaps best explained by one commentator:

> "First, the unjustified exclusion of any child from all public schooling denies to that child the equal protection of the laws when the state makes the opportunity freely available to other children. Second, the operation of our unfair procedure in the stigmatization by public authority of any person or the denial to him of any public good denies the process due each person under the 14th Amendment. Such a stigmatization and denial is involved in labeling children as exceptional, retarded, or handicapped and placing them in a special class, or excluding them from schooling entirely. These two rights, equal protection and due process, merge to form the emerging constitutional right to an education which guarantees to every child a minimally adequate publicly supported educational opportunity." 10

We would hope that this presentation will enable more people to strive for the realization of the commitment to universal education for all.

FOOTNOTES

1. U.S. Code, Cong. Admin. News, Vol. 3, 93rd Congress, 2nd Session, 1974.

2. Ibid. at p. 4146.

3. Ibid. at p. 4145.

4. 348 F. Supp. 866 (D.C.D.C. 1972)

5. 343 F. Supp. 279 (E.D. Pa. 1972)

6. Iowa Code Annotated, Title XII, Sec. 281.2 (1974).

7. Kansas Statutes Annotated, Article IX, Sec. 72-961 (1974).

8. Hawaii Revised Statutes, Title 18, Sec. 301-22 (1955).

9. Exceptional Children, Vol. 34, No. 7, March 1968.

10. Dimond , The Constitutional Right to an Education: The Quiet Revolution, 24 Hastings Law Journal 1087, 1093 (1972-73).

P.A.R.C. v COMMONWEALTH OF PENNSYLVANIA

MILLS v BOARD OF EDUCATION

P.A.R.C. v COMMONWEALTH OF PENNSYLVANIA

In January, 1971, the Pennsylvania Association for Retarded Children (P.A.R.C.) brought a class action suit against the Commonwealth of Pennsylvania for the failure to provide all retarded children access to a free public education. It was estimated that at the time of the filing of the suit, about 50,000 mentally retarded children were excluded from any education in the state school system. The plaintiffs included fourteen mentally retarded children of school age, representing themselves and "all others similarly situated, "i.e., all other retarded children in the state. The defendants (referred to below as State Education Officials) included the State Secretaries of Education and Public Welfare, the State Board of Education, and thirteen school districts, representing all school districts in the state. The P.A.R.C. suit specifically questioned public policy as expressed by state statutes, namely the policies and practices which excluded, postponed, or denied free access to public education to school age mentally retarded children.

The court dramatically brought this problem to the public's attention with its decision that mentally retarded children have a right to an education and that school boards have a duty to provide all such children with a free public education suited to their needs.

It defines the newly recognized right as follows:

> "Expert testimony statements made by persons recognized by the court to be authorities in their respective fields in this action indicates that all mentally retarded persons are capable of benefiting from a program of education and training that the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency, and the remaining few, with such education and training, are capable of achieving some degree of self-care; that the earlier such education and training begins, the more thoroughly and the more efficiently a mentally retarded person will benefit from it; and, whether begun early or not, that a mentally retarded person can benefit at any point in his life and development from a program of education and training."

This definition is significant in terms of the following assertions:

1. The provision of systematic education programs to mentally retarded children will produce learning;

2. Education cannot be defined solely as the provision of academic experiences to children, but must be viewed as a continuous process through which individuals learn to cope and function within their environment. For children to learn to clothe and feed themselves is a legitimate outcome achievable through an education program;

3. The earlier children are provided with educational experiences, the greater the amount of learning that can be predicted.

Whenever a federal court recognizes a "right" not previously recognized, a change occurs in the relationship between the government and its citizens. The law of Pennsylvania prior to the decision in P.A.R.C. was used to exclude retarded children

from programs of education and training in the public schools. As a result of the P.A.R.C. proceedings, those in charge of public education in the state (the defendants) agreed to a reinterpretation of the statutes satisfactory to those representing mentally retarded children. Two "Special Masters" were appointed by the court to implement its order to assure that these newly-gained rights would be extended to all exceptional children in Pennsylvania who required special educational facilities and assistance; this included overseeing compliance with the order as well as the processes of identification, evaluation and notification of children and parents.

In practical terms, the P.A.R.C. decision has affected school policies in Pennsylvania in the following ways:

1. In the Amended Consent Agreement, State Education Officials agreed not to "postpone or in any way to deny access to a free public program of education and training to any mentally retarded child." And the Attorney General of the Commonwealth of Pennsylvania agreed to issue an Opinion stating in essence that even though the Board of Education retains the right of determining the placement of mentally retarded pupils, they may no longer indefinitely postpone their admission into the public schools and effectively deny them an education or training.

2. In addition, the Board of Education is required, in compliance with the Due Process Clause of the 14th Amendment of the U.S. Constitution, to notify and provide an opportunity for a hearing before a child's admission (as a beginner in the lowest grade of a regular primary school, or the lowest regular primary class above kindergarten) may be postponed. In this way, the arbitrary classification and assignment of a child denied admission to a regular school is not allowed.

3. Also, the new regulations require the automatic re-evaluation every two years of any educational assignment other than to a regular class and provide for an annual re-evaluation at the request of the child's parent or guardian.

4. When these requirements of notice and opportunity for a hearing have been met, and the child is denied admission to this regular primary school or the lowest regular primary class, the regulations require the "timely placement" of such child in a free public program of education and training in accordance with the amended statutes.

Similar provisions were made in relation to the statutes regarding compulsory school age and attendance and the definition of special classes, including those for homebound and "uneducable" children.

The appointment of the Special Masters by the State Education Officials of Pennsylvania, even though they were to be technically

in an adversary relationship with the defendants, occurred through the state's consent to the judgment and to their appointment. This recognition of the rights of exceptional children through negotiation rather than through edict is an example worthy of emulation by all other states, as evidence of a spirit of mutuality in their efforts to change the pattern of recognition of the rights of children who have traditionally been left with little or no opportunity for an education or training.

MILLS v BOARD OF EDUCATION

Turning now from P.A.R.C. to Mills v. D.C. Board of Education, 348 F. Supp. 866 (D.D.C. 1972), we find that what P.A.R.C. achieved by consent agreement (an agreement made by the parties, not an order by the judge), Mills mandates under a court order. P.A.R.C. provided for "the right of all handicapped children to a publicly supported educational program..." Mills, on the other hand, provided "...welcome precedent for the claim that an estimated one million children across the country who are totally excluded from public schools because of various handicaps are being deprived of their various constitutional rights." McClung, Do Handicapped Children Have a Legal Right to a Minimally Adequate Education?, 3 Journal of Law-Education 153 (1974). Like P.A.R.C., Mills was a class action brought by seven named plaintiffs against several defendants including members of the D.C. Board of Education, members of the Special Education Department of the D.C. Board of Education, and members of the D.C. Department of Human Resources.

The Mills plaintiffs alleged in their complaint that, on the basis of their having various physical and mental disorders, they were excluded from education programs in the District of Columbia. To support this contention, the plaintiffs introduced evidence that of an estimated "22,000 retarded, emotionally disturbed, blind, deaf, and speech or learning disabled children" within the

city, "perhaps as many as 18,000 of these children were not being furnished with programs of specialized education." Plaintiffs went on to prove that in a "1971 report to the Department of Health, Education and Welfare, the District of Columbia Public Schools admitted that an estimated 12,340 handicapped children were not to be served in the 1971-72 school year."

On behalf of all children who had been excluded or otherwise deprived of access to publicly supported education, the plaintiffs challenged their exclusion, and the procedures and practices by which the District of Columbia education and social service officials had denied children their public education.

Because this decision was based on both the equal protection and due process clauses of the Constitution, the issues of a right to an equal opportunity for an education and the right to procedural safeguards for both parents and children were addressed directly. Recognizing that his determination was necessarily fraught with emotion and import for all concerned, Judge Waddy concluded that:

> "...no child eligible for a publicly supported education in the District of Columbia public schools shall be excluded from a regular public school assignment by a rule, policy, or practice of the Board of Education of the District of Columbia or its agents unless such child is provided (a) adequate alternative educational services suited to the child's needs, which may include special

> education or tuition grants, and (b) a constitutionally adequate prior hearing and periodic review of the child's status, progress, and the adequacy of any educational alternative."

This opinion became known as the Waddy Decree. The section quoted above echoes the P.A.R.C. opinion discussed earlier, in its recognition of the right of every child to an adequate education suited to her/his needs. In addition, the section recognizes the necessity for procedures to safeguard the rights of parents and children in terms of hearings to determine the need for special education and for the review of the efficacy of whatever special education arrangements have been made.

Judge Waddy, by basing his decision in this case on Constitutional grounds, eliminated the concept of uneducability; he declared the rights of children to a suitable education regardless of the degree of the child's deviation from the norm, and ordered such education regardless of the fiscal impact on the school system:

> "The District of Columbia shall provide to each child of school age a free and suitable publicly supported education regardless of the degree of the child's mental, physical, or emotional disability or impairment. Furthermore, the defendants shall not exclude any child resident in the District of Columbia from such publicly supported education on the basis of a claim of insufficient resources."

The Waddy Decree is clearly the effort of this court to define and then to ensure the right to a suitable education to each child on an equal basis in the District of Columbia. It has

achieved great notoriety within the education community in this country. We spoke earlier, in the section on the P.A.R.C. case, of the efforts of the state educational resources and the legal counsel for the plaintiffs there, to cooperate in an attempt to solve the problems of the children and families involved. We turn now to see how the Waddy Decree has affected the life of such a child in the District of Columbia.

IMPLEMENTATION OF MILLS

The preceding analysis of Mills v. Board of Education has shown that special children have a right to a publicly supported education consistent with their needs. In defining this right to an education, Judge Waddy outlined the responsibilities of the Board of Education in providing alternative educational services for exceptional children. He also handed down the procedures to be followed in making these services available. However, compliance by the Board with the Court's order was not forthcoming. In fact, from the time it was delivered in August, 1972, the Mills decision has never been fully or properly implemented. As a result, litigation has been instituted several times in the last three years in an attempt to force compliance. An understanding of these attempts at implementation can best be gained by examining the case of Thomas Andrews and his struggle to obtain the education guaranteed him by Mills v. Board of Education.

Thomas Andrews, one of six children from a low-income family, is a 15-year-old resident of the District of Columbia. Thomas has a long history of emotional and psychological problems that have repeatedly been diagnosed but never properly treated. School psychologists and outside consultants have reported that Thomas is prone to severe depression, easily overcome by emotional stress, and is in constant danger of emotional collapse. These psychological conditions have had a deleterious effect on his

educational development and his ability to function in a conventional classroom environment. A study of Thomas Andrew's educational records reveals a series of disciplinary problems and academic failures.

The school system did make some attempts to correct Thomas's academic and emotional problems. Evaluations and recommendations were made that frequently suggested tutoring, remediation and mainstreaming as a means of meeting Thomas's needs. These recommendations were usually followed, but resulted in no substantial improvement in educational or emotional growth.

In January, 1974, Thomas Andrews's social worker, displeased with the school system's handling of her client's case, persuaded Mrs. Andrews to have a special education hearing instituted in her son's behalf. On February 19, 1974, the first of what were to be three placement hearings was held. The hearing was authorized and governed by the guidelines set down in the Waddy Decree. It was run by an independent hearing examiner, with Mrs. Andrews voicing her concerns, and school officials presenting the case for the Board of Education. Both parties were afforded an opportunity to present and cross-examine witnesses, introduce evidence, and enjoy the benefits of legal counsel. The findings of this first hearing were inconclusive. The hearing officer felt that further tests and examinations should be conducted to insure

that a correct educational program would be prescribed.

The second hearing was held on September 20, 1974, at which time the results of the tests requested at the first hearing were analyzed. It was also reported at this time by Mrs. Andrews that Thomas had not attended classes since the start of the school year. School officials argued that this was partly due to the unavailability of suitable placement. They went on to suggest that Thomas be placed in a regular junior high school and that his program be supplemented with personal tutoring, procedures which had been instituted in the past with dismal results. The hearing was ordered continued until further witnesses and documents could be presented.

The third hearing was convened on December 19, 1974, approximately ten months after the first hearing. On this occasion, Mrs. Andrews was represented by Peter Burnett, a legal intern at the Antioch School of Law. School officials opened the meeting by noting that Thomas had been placed in an interim special education center since the time of the last hearing. They argued that there was a marked improvement in Thomas's condition in the last few months and that the interim placement should be continued. Counsel for Mrs. Andrews disagreed with the school system's findings and recommendations. He cited test results that showed that there was no academic progress since the interim placement.

In addition, he introduced evidence showing that Thomas's emotional condition was deteriorating rather than improving. Also entered into the record were letters from psychologists and social workers recommending that Thomas be placed in a residential treatment center where his total needs could be more adequately met. Counsel concluded his presentation by stating: "The school system has abdicated their responsibilities regarding Thomas Andrews who is 15 years old but reads like a seven year old. The public schools wish to return Thomas to an environment which has already resulted in failure. This recommendation should not be followed. Thomas should receive residential care financed through a tuition award grant."

On January 8, 1975, the hearing officer, after weighing all the evidence, made the following determinations. "First, that the severe emotional problems of Thomas Andrews are of such a nature that placement in a public school program of any type would not be fruitful toward long range goals." He ruled that Thomas be awarded a tuition grant for placement in a residential therapeutic setting. "Second, that the District of Columbia be responsible for all financial costs involved in the residential placement, in accordance with the Waddy Decree."

Thus, after nine years of frustration and neglect within the public school system, Thomas was to be enrolled in a program

that would best meet his pyschological, emotional, and educational needs. Unfortunately, the ordering of such a program and its implementation were not one and the same.

According to the Waddy Decree, after a determination is made by a hearing officer, school officials must comply with the officer's order within thirty days. Forty days passed and Thomas was still not placed in the residential center that was selected. Frequent communication with school officials proved fruitless as they contended that there were insufficient funds available to provide for Thomas's tuition grant. Thomas Andrews then turned to Judge Waddy's court to seek the education to which he was entitled.

When Judge Waddy issued his original Decree in August, 1972, he purposely retained jurisdiction over the case to allow for implementation, modification, and enforcement of his order. Attorneys for the original plaintiff class in Mills returned to the Waddy Court in December, 1973 to assert that the Board of Education had failed to comply with the Decree. They brought before the court 160 children, and claimed that there were probably several hundred more who were recommended for special education programs as a result of Mills-sanctioned hearings, but who had not been placed. Plaintiffs further argued that the Board had failed to budget funds properly for special education

services in violation of the court's Order. They claimed that the Board of Education had willfully avoided complying with the Decree, and that a special master should be appointed to oversee the special education program for the District of Columbia.

Judge Waddy responded to the Board's failure to comply with his original ruling by ordering the defendants to work with plaintiffs' attorneys in the submission of stipulations showing a plan for compliance with the Decree. He also demanded that the 160 children before the court be placed immediately, and that the Board identify and place all children in plaintiffs' class. The Judge denied the request to appoint a special master.

On July 1, 1974, counsel for plaintiffs and defendants submitted the following stipulations to the court:

A. Improvement of the procedures for Mills hearings to assure more effective review of each child's status and needs, adequate notice to parents of prospective changes in placement, full access to school records on which placement determinations are based, and availability at hearings of all necessary school employees.

B. Assurances by defendants that funding and payment of salaries for hearing officers will continue without interruption.

C. Assurances by the Board of Education that it will expedite placement of students for whom hearing officers have

determined there is no adequate public school placement.

D. Implementation of procedures to assure the expeditious processing and payment of contracts submitted by the Department of Special Education of Public Schools for tuition payments to private schools.

E. Stipulation by the Board of Education and Department of Human Resources regarding agreements on cost sharing, including the cost of residential school placement for non-wards who cannot be educated in the public school system because of their handicap; joint programs for emotionally disturbed, severely retarded, and other groups of handicapped children; aid toward the provision of adequate resources for parents who wish independent assessments of their children prior to a Mills hearing; these costs to be paid by either the Board of Education or the Department of Human Resources. These stipulations were viewed favorably by the Court as a sign that the Board was now ready to comply fully with its Decree.

Therefore, it was particularly disturbing when on March 7, 1975, counsel for Thomas Andrews filed motions for relief against the Board of Education for violating the Mills Decree and the court-sanctioned stipulations of 1974. Plaintiffs' attorneys initiated the action for Thomas and 63 other children, all of whom had been recommended for special education programs but

had never been placed. Plaintiffs demanded that they be placed immediately. They also requested that the Court appoint a special master to insure the Board's compliance with the Mills decision in the future.

The principle argument presented by the defendants was that there were insufficient funds available to finance the required placement of all special children in the District. They urged the court to allow them time to formulate a plan that would solve this funding problem. Further, they reported to the court that 43 of the 63 class plaintiffs had already been placed and that Thomas Andrews would be placed shortly.

On March 27, 1975, Judge Waddy issued his order. First, he found the defendants in contempt of court for their failure to comply with the Decree of August, 1972. He reiterated his contention that if sufficient funds were not available to finance all of the services that were needed and desireable in the public school system, then available funds must be expended equitably in such a manner that no child was entirely excluded from publicly supported education consistent with his needs and ability. Second, that Thomas Andrews be placed immediately in the appropriate educational setting. Third, that the defendants must submit to the court within 20 days a report outlining their plans for future implementation and compliance with the Decree. Fourth, that he would hold in abeyance plaintiffs' request for

appointment of a special master pending the submission of the defendants' report to the court.

When the court convened on April 18, 1975, Judge Waddy had already examined the Report submitted by the defendants. The Judge found that the defendants had not formulated in their Report a concise plan for complying with the Mills decision. The Report did not satisfactorily resolve the crucial issue of funding. There were no assurances in the plan to indicate that the defendants could now guarantee that past financial deficiencies had been corrected. Hence, Judge Waddy refused to vacate his contempt order. He also stated he would reconsider the plaintiffs' motion for appointment of a special master.

The Board of Education did comply with one phase of Judge Waddy's order of March 27. After sixteen months of education hearings and court battles, and an entire academic career filled with misery, Thomas Andrews was finally placed in the Leary School in Winchester, Virginia. It is too early to predict the success or failure of Thomas's residential therapeutic placement. However, evaluations sent to his attorneys at the Antioch School of Law show surprising progress considering his short exposure to his new milieu. The question that now remains unanswered is how the deficiencies and inefficiencies in the school system, which for

so long prevented Thomas Andrews from receiving an education consistent with his needs, can be eliminated.

Judge Waddy's answer to the question was contained in his decree of June 9, 1975, calling for the appointment of a special master to assist the court in implementing the Mills decision. The role of a special master is authorized and discussed in Rule 53 of the Federal Rules of Civil Procedure. The Rule allows a judge to appoint a master in any action pending before the court. It states that the powers of the master may be specified in the order of reference, that is the document by which the parties may determine the scope and nature of the master's duties. The order may be as general as an order to "implement or help achieve compliance with a court order," or may be so specific as to direct the master to perform "particular acts or to receive and report evidence only."

The role of the Special Master in the District of Columbia would be one of making a thorough and specific investigation of the problems experienced by the Board of Education in complying with the Waddy Decree, and making concise recommendations designed to implement that Decree. The Master would supplant neither the Board nor the court; rather, it assures both parties that they will have professional advice from a neutral person thoroughly familiar with the educational system. The Master will be able

to receive reports and documents, meet with proper responsible persons, and have full access to all pertinent data. As an educational expert the Master will be able to assess the adequacy and quality of the programs being offered and to recommend changes which will better assure appropriate education.

It is hoped that the efforts of the Special Master will eliminate the institutional maladies that plagued Thomas Andrews, and prove productive in establishing an educational system that will meet the needs of all children.

COMMENTS ON STATE STATUTES

In preparation for this conference, several of us have taken a detailed look at the provisions for exceptional children made by each state in its special education statutes. We have chosen one statute as representative both of a thoughtfully written special education law and of one which embodies in its language many of the values and provisions which we recommend. We have provided the following statement as an overview in terms of some specific concepts.

I. First, it would seem that the basic function of such a statute is to provide an opportunity for all children to receive an education appropriate to their needs. Mills dictates that conclusion for the District of Columbia, but so does common sense. The enactment and functioning of such a scheme is central to our growing awareness of the constitutional rights of citizens as well as to our responsibilities as advocates in the broad sense, for our children.

Second, the point should be made that many statutes imply value judgments about the children they concern, using such words and concepts as "inferior." If we are working to protect

the rights of people, then we would be well advised, it would seem, to begin that protection conceptually in the framing of our statutes. We have not covered at all, for instance, children with special needs because they are gifted, or because they are pregnant, married, or parents. Some statutes address the needs of these children; others exclude them from the public school system on a discretionary basis; others specifically include them. "Appropriate education" for a child's needs should not require or imply value judgments in the definition of that child's needs.

II. In our examination of all statutes, we were, surprisingly to us, able to find one which we feel embodies most, if not all, of the factors which we have come to believe make good special education law. We have reproduced that statute, from Louisiana, with the expectation that it will demonstrate better than our abstract words, what those factors are.

A. Generally, the Louisiana statute is short, compact, and comprehensive. Its "Declaration of public policy" expresses the state's understanding of its responsibilities towards all its children in the strongest and most comprehensive manner of any state. The rest of the statute follows the Declaration's lead efficiently and effectively in terms of assuring the educational rights of all children in Louisiana. Of note here is the fact that the age range covered in the statute -- three

to twenty-one years -- is broad. Several states have the same time span; others are less generous.

B. Looking specifically at the several sections of the statute, we see that in §1943A, the state protects both the child and the family by requiring diagnosis and parent consultation prior to exclusion from normal classes. Parents have the express right to a second opinion, as well. Subsection B provides another important protection for the child and the school, when it requires that classes for the handicapped may not be utilized for the placement of children with disciplinary problems if those children are not handicapped. Subsections C and D provide for retesting and reevaluation when requested by parents and/or supervisors after reasonable periods of time; diagnosis and reevaluation is mandatory every three years. All of these provisions recognize the possibility of change in a child and act to mitigate the dangers of a child's either getting lost in a system or needing an alteration in her/his program.

Section 1944 details the state's commitment to keep special children in normal classes unless better results can be obtained with the use of segregated classes. Some states mandate that special children be segregated. Some states require a minimum number of children to form a class without defining what happens

to the available children if that minimum isn't reached. In order to implement its commitment, Louisiana requires the provision of transportation as necessary and the removal of architectural barriers. Many states go into great detail about transportation allowances for children in various situations, again raising the question of what happens to the child whose problems, or even existence, results in a budget over-run. We feel that the requirement of removal of architectural barriers for special children goes far towards equalizing physical and social opportunities for children in schools.

The item of greatest significance to our survey in §1945, is the inclusion of classes for hospitalized children. If all children have a right to an education suitable to their needs, then institutionalized children have that right as well. States vary in their treatment of this group. Some specifically exclude institutionalized children from the purview of the public school system; some specifically include these children; other statutes are silent.

Also noted in §1945, is the provision that age and achievement levels shall not span more than three years or units. While we are not education experts, it seems to us that this provision offers important protection to both students and teachers.

Section 1946 is not an area within the subject matter of this paper, or of our expertise.

We see in §1947, further evidence of Louisiana's commitment to its responsibilities for its children. Districts may contract with other districts for services for particular children. The real protection for the child, however, is that the child's own district retains its obligation of supervision. There is less chance here of the child's being "dumped" on someone else, thereby being "gotten rid of" when, as here, the locus of responsibility is clear and explicit. We have not seen another statute with this protection for the child.

The distinction of §1948, is its clarity. We have spent many hours with many of the state statutes, searching for these administrative provisions. We suspect that parents, teachers, and administrators themselves, have spent long hours at this task, as well, in an effort to learn of, or to fulfill, their obligations to their children.

Section 1949 is not within our scope.

Section 1950 provides for diagnostic facilities for the children of the state, apparently in an effort to ensure both a relative standardization of quality for these services, and their availability.

Section 1951 gives authority to parents who want their children to be taught in a particular type of class grouping, to try to arrange that class. It is not clear to us how this works in terms of either the children or the schools, but granting mechanisms of control for parents of special children

may well be a safeguard for all concerned.

Section 1952 provides for the "sweeping" by each agency to ensure that appropriate authorities are aware of each child of school age and of his/her educational needs, whether or not that child is enrolled in school. This is a critical provision in terms of meeting the interests of the child and the responsibility of the schools. We looked either in vain or at length, in many state statutes, for such a "district sweep" provision. Some states do provide for an annual "sweep." Some count only those children already enrolled, missing those who have not been evaluated at all, and eliminating those who may have been deemed ineligible for public school education.

III. In conclusion, Mills dictates an appropriate education for every child (in the District of Columbia). Compliance with that concept involves a) finding the child; b) evaluating her/his needs accurately -- both initially and periodically; c) providing appropriate facilities -- including classes, teachers, physical structures, and the means of getting to them; and d) financing all of these operations.

The state statutes generally attempt to deal with some, or all, of the above problems. Most leave significant gaps in at least one area, although that area varies from state to state.

Assuming that all of us are interested in the education of all our children, we will have to work with our state legislatures

to organize the special education statutes into non-discriminatory and workable units so that neither we nor our children get short-changed, lost, or left out altogether.

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CHAPTER 8. SPECIAL EDUCATION AND TRAINING

The heading of this Chapter was changed from "Schools For Handicapped Persons" by Acts 1972, No. 368, § 1.

PART I. EDUCATIONAL AND TRAINING FACILITIES AND OPPORTUNITIES FOR THE HANDICAPPED

Acts 1972, No. 368, amending and reenacting R.S. 17:1941 to 17:1952, provides in Section 2 that the provisions of this act shall become effective no later than in the 1973-74 school year.

§ 1941. Declaration of public policy

It is and shall be the duty of the various branches and divisions of the public school system of Louisiana, both state and local, to offer the best available educational, learning, and training facilities, services, classes, and opportunities to all children of school age within their respective boundaries. This includes all children of school age whether normal, exceptional, crippled, or otherwise either mentally or physically handicapped, and whatever may be the degree of that handicap.

Amended by Acts 1964, No. 487, § 1; Acts 1972, No. 368, § 1.

1. In general

Parish school board must provide students when such is necessary. Op. trknsportation for special education. Atty Gen., Sept. 18, 1974.

§ 1942. Purpose

A. The purpose of this part is to require that suitable special education and training facilities, services, classes, and opportunities be provided for all physically and/or mentally handicapped and other exceptional children of public school age, or within the broader age limits hereinafter provided.

B. Physically handicapped, mentally handicapped, and other exceptional children, for the purposes of this and subsequent sections, include slow learners, educable, and trainable mentally retarded; deaf and hard of hearing; speech impaired; blind and/or partially sighted; emotionally disturbed; cerebral palsied; gifted; children with learning disabilities, crippled, and other health impaired children who by reason thereof require or need special educational and/or training services, facilities and opportunities. Trainable mentally retarded shall include children down to twenty-five I.Q.

C. Children who have been identified and are eligible for services in the categories described in the preceding paragraph shall be not less than three years of age nor more than twenty-one years of age, subject to the rules and regulations of the State Board of Education concerning the age groups of children who may be reasonably taught or trained together.

Amended by Acts 1964, No. 487, § 1; Acts 1972, No. 368, § 1.

§ 1943. Identification for special educational or training services required for exclusion from normal classes

A. No child shall be excluded from normal classes because of mental or physical disability or handicap until his condition has been diagnosed and he has been recommended for available special education classes by one of the special education centers located in the state colleges and universities or by other competent authorities designated by the State Department of Education, pursuant to the rules and regulations of the State Board of Education. A personal consultation with the parent or guardian shall be provided. Upon request a written summary statement of the diagnosis and recommendation will be provided to the parent or guardian. The parent or guardian shall have the right to have the child retested by other competent public or private authorities, and, if the retesting justifies, to determine the correct evaluation in the district court or juvenile court of the parish of the child's domicile.

B. The provisions of this section shall not forbid the exclusion of a child from normal classes or from special education classes for disciplinary reasons.

but no child who is not handicapped, including emotionally disturbed, shall be assigned to a class for the handicapped because of disciplinary reasons. He shall upon proper diagnosis and evaluation, be assigned to a class for his specific handicap.

C. Parish and city school boards shall, upon written demand by the parents or guardians of children having difficulties in normal school classes, have the child diagnosed and evaluated as above provided, unless such a diagnosis or evaluation has been made within the past one year. Diagnosis and re-evaluation shall be required for each child every three years.

D. The parents and supervisor of special education services of the parish or city school board may request a reevaluation after six months of enrollment in a special education class.

Amended by Acts 1964, No. 487, § 1; Acts 1970, No. 180, § 1; Acts 1972, No. 368, § 1.

§ 1944. Special education teachers, classes, materials, opportunities, day schools, hospital classes, home instruction

Parish and city school boards shall, subject to the limitations hereinafter specified, provide special education teachers, aides, materials, and opportunities for all children within their boundaries diagnosed as needing special education, to the end that such children shall be kept in normal school classes unless the number thereof be sufficient to justify the establishment and maintenance of special classes. For the same purpose parish and city school boards shall provide transportation as necessary and as rapidly as possible remove all architectural and other barriers making it impossible or impractical for such children to attend normal classes.

Whenever best educational or training results can be obtained by assembling special classes of any of the several types of children specified in R.S. 17:1942, the parish and city school boards shall establish and maintain such special educational and/or training facilities and classes for such children. Adjacent and nearby parish and city school boards may pool their resources for this purpose.

Amended by Acts 1964, No. 487, § 1; Acts 1970, No. 180, § 1; Acts 1972, No. 368, § 1.

1. Construction and application

Parish school board must provide transportation for special education students when such is necessary. Op. Atty.Gen., Sept. 18, 1974.

§ 1945. Payment of extra cost of instruction, education or training of handicapped and other exceptional children

A. Whether the handicapped children certified as needing or requiring special educational or training services as provided in R.S. 17:1943 are served in normal classes, special classes, day schools, hospital classes, or in their homes, each parish and city school board is hereby authorized to include in its cost program the salaries, according to the Official Louisiana Teachers Salary Schedule, of each special education teacher, therapist, and/or teachers' aide who is qualified according to the requirements of the State Board of Education and who is engaged in the teaching or training, exclusively, of handicapped or other exceptional children who are eligible to receive such education or training according to the rules and regulations of the State Board of Education.

B. The allotment of teachers as hereinabove stated is in addition to the allotment of teachers in the regular classroom and is based on the following minimum and maximum pupils per teacher or therapist:

(1) Slow learners; one teacher per twelve to eighteen pupils;

(2) Educable mentally retarded; one teacher per ten to fifteen pupils;

(3) Trainable mentally retarded; one teacher per eight to twelve pupils;

(4) Deaf or hard of hearing; one teacher per eight to ten pupils;

(5) Blind or partially sighted; one teacher per eight to ten pupils;

(6) Speech impaired; one therapist per one hundred pupils; however, on and after September 1, 1975 there shall be one therapist per sixty to eighty pupils, and after September 1, 1976 there shall be one therapist per forty to sixty pupils;

(7) Cerebral palsied; one teacher per eight to ten pupils;

(8) Emotionally disturbed; one teacher per eight to ten pupils;

(9) Severely and profoundly mentally retarded; one teacher per five to seven pupils;

(10) Learning disabled; one teacher per eight to ten pupils;

(11) Others; as determined by regulations of the State Board of Education.

There shall not be a chronological age span of more than three years or an instructional span of more than three grades and/or achievement levels applicable to all of the above categories.

When there are fewer than the minimum number of pupils per teacher as specified above, then the state allotment for the approved teacher, therapist or aide shall be reduced one-tenth for each pupil less than the specified minimum. The amount of the reduced state allotment shall be paid to the teacher from the local school board funds.

The special education teachers, therapists, and aides employed by the state allotment as aforesaid shall be used entirely to serve those children needing special educational or training services for whose benefit the state allotment was made. If the children are not assembled in special classes these services shall be rendered under such rules and regulations as the State Department of Education and the parish or city school board may adopt.

Amended by Acts 1964, No. 487, § 1; Acts 1972, No. 368, § 1; Acts 1974, No. 486, § 1.

The provisions authorizing payment of costs of instruction were formerly codified as R.S. 17:1946.

§ 1946. Qualifications of supervisors, teachers, therapists, and aides

No person shall be employed as director, supervisor, therapist, teachers, or aide, who does not hold a valid degree or certificate as provided by law or unless he has had such special training as the state superintendent of education may require. Provided, however, that the requirements shall not prevent the implementation of this part.

Amended by Acts 1964, No. 487, § 1; Acts 1972, No. 368, § 1.

The provisions setting forth qualifications of supervisors and teachers were formerly codified as R.S. 17:1947.

§ 1947. Purchase of services

Parish and city school boards may, with the consent and approval of the State Department of Education, contract with nearby public school districts, the State Department of Hospitals, or approved private schools, facilities, or contractors for the rendition of special educational and training services, on the job training, or distributive education to particular handicapped or exceptional children when for valid reasons it is not feasible or desirable for the parish or city school board to itself serve the particular child or children to the same extent. This shall not relieve the parish or city school board or State Department of Education of its obligation of supervision. In such event the parish or city school board is authorized to pay tuition or training costs not to exceed the average gross cost per educable in the school district plus the pro rata part of the state allotment provided above for serving pupils requiring special education, training, or opportunities. The time of payment may be determined by contract.

No pupil shall be eligible for funds for contract services under this Act unless he has been diagnosed and evaluated as eligible to enroll in an appropriate special education class or facility if such were available in his parish or city of residence.

Contracts for the services of the Department of Hospitals shall not be made with regard to any child with an I.Q. above twenty-five unless other handicaps make him totally unsuitable for special education or training from the public school system of Louisiana; provided, however, that the State Board of Education may contract with designated certified state mental health centers and clinics for the evaluation and diagnosis of handicapped children for assignment to special education classes.

Amended by Acts 1964, No. 487, § 1; Acts 1966, No. 539, § 1; Acts 1970, No. 180, § 1; Acts 1972, No. 368, § 1.

The provisions authorizing purchase of services were formerly codified as R.S. 17:1945.

1. In general

Under statutes making establishment and maintenance of special education classes for one or more types of mentally retarded children mandatory only when "feasible," discretion allowed school board in determining what is "feasible" made mandamus an inappropriate remedy of parish residents who sought to compel school board to establish and maintain such classes. Slusser v. Credeur, App.1971, 252 So.2d 688.

Under statutes making establishment of special classes for mentally retarded children mandatory only when "feasible," failure to establish and maintain such special education classes was not an arbitrary or capricious abuse of discretion. Id.

§ 1948. Administration of Chapter

The entire provisions of this chapter shall be administered by the State Department of Education, with the approval of the State Board of Education, and on the parish level, by the parish or city school boards; and the State Board of Education shall promulgate such rules and regulations as it may deem necessary for the proper administration of this chapter.

The State Board of Education shall prescribe the standards and approve the conditions under which the facilities are furnished or services purchased. The state superintendent of education shall be responsible for administering the same.

Amended by Acts 1964, No. 487, § 1; Acts 1972, No. 368, § 1.

§ 1949. Cooperation with other agencies; gifts or donations

The parish and state school agencies are authorized to cooperate with other agencies within the state, both public and private, that are interested in working toward the education or training or the alleviation of the handicaps of handicapped children and other exceptional children, and said educational agencies are authorized to accept gifts or donations, or aid from such private agencies.

Amended by Acts 1964, No. 487, § 1; Acts 1972, No. 368, § 1.

§ 1950. Special education centers

A. The State Board of Education shall designate and certify special education centers which may be located in state colleges and universities, as competent authorities for the psychological and educational diagnosis and evaluation of handicapped and other exceptional children, and pupils may be assigned to such special classes or facilities, or for special education or training, only upon the recommendation of said special education centers or other competent authorities approved by the State Board of Education. These special education centers may contract with certified mental health centers and clinics or with other certified persons or agencies which are approved by the State Department of Education for the evaluation and diagnosis of these exceptional and handicapped children.

B. The State Board of Education is authorized to contract with the above designated and certified special education centers for the psychological and educational diagnosis and evaluation of handicapped and other exceptional children, subject to the provision that such services be performed only by those personnel of the special education centers who are otherwise qualified and certified by the State Board of Education as a competent authority; provided, however, that the State Department of Education may further contract with parish and city school boards for their services in any area where either an abundance of proof is furnished that the colleges and universities and the community mental health centers and clinics are not or cannot ade-

quately meet the evaluation needs or where sufficient demand for evaluation services exist to warrant rendering service in an alternative manner.

C. An advisory committee composed of fifteen persons representing consumer groups, educators and the professionals involved shall be appointed by the State Board of Education to study and review the activities of the existing special education centers to determine if they are performing satisfactorily and to determine if there is evidence to justify the extension of contracts to parish and city school boards.

Amended by Acts 1964, No. 487, § 1; Acts 1972, No. 368, § 1; Acts 1972, No. 544, § 1; Acts 1973, No. 70, § 1.

This section amended twice in 1972 by Acts 1972, No. 368, § 1 and Acts 1972, No. 544, § 1. Act No. 368 was printed as the text of 17:1950 on authority of R.S. 24:253.

§ 1951. Petition for special class; organization

When there are five or more of any one type of handicapped or other exceptional children who can reasonably be taught together, then the parents or guardians of such children may petition the parish or city school board for the organization of an appropriate class or facility for such children, subject to the conditions of this Chapter and the rules and regulations of the State Board of Education. The rejection of any such petition shall be subject to court review upon petition by the parents or guardians of such children.

Amended by Acts 1964, No. 487, § 1; Acts 1972, No. 368, § 1.

§ 1952. Names, facts and opinions to be furnished parish and city school boards, state department of education

It shall be the duty of all state agencies offering services to handicapped and other exceptional children, to provide to appropriate parish and city school boards and/or the State Department of Education or its designated competent authorities, names, facts, and opinions pertinent to the proper educational or training placement of handicapped or other exceptional children who are enrolled or who expect to enroll in the public schools, and to advise other volunteer agencies by the State Board of Education of those facts concerning any child excluded from normal classes because of mental retardation.

The facts and opinions pertinent to the proper education or training of handicapped and other exceptional children shall so far as practical divide the children according to type of handicap and the cause therefor, and if mentally retarded the degree of mental retardation and the cause therefor if known. It being especially recognized that different types of mentally retarded children need different types of special education and training. Insofar as possible overlapping or combined handicaps and health problems should be recognized and reported.

Amended by Acts 1964, No. 487, § 1; Acts 1972, No. 368, § 1.

******** KNOW YOUR LAW ********

In preparation for this conference, students at Antioch School of Law prepared materials concerning appropriate state statutes and constitutional provisions with regard to the right to special education.

Unfortunately, we are unable to provide the material here because of the expense involved in duplicating the information for all 50 states and territories for each conference participant.

If you feel this material would be of benefit to you, please send a self addressed, stamped envelope to:

LAW & EDUCATION CLINIC
ANTIOCH SCHOOL OF LAW
1624 Crescent Place, N.W.
Washington, D.C. 20009

Indicate which state(s) you are interested in, and send 25¢ for each copy requested.

CONCLUSION

A review of the cases cited in this paper indicates that most plaintiff parents, children, or associates have been seeking court orders to compel equal treatment by school officials. Some actions on behalf of exceptional children have been based on state and federal guarantees of equal protection and due process of law to secure the rights of this population. A recent Supreme Court case, Wood v. Strickland, 43 U.S.L.W. 4293 (February 25, 1975) held that individual school officials are not immune from personal liability for damages if those officials either knew or reasonably should have known that their action regarding a student was within the sphere of their professional responsibility and would violate the constitutional rights of the student affected. There is no question that school officials will have to be familiar with statutes requiring education for exceptional children as well as with the constitutional guarantees of due process prior to the placement of a child. The contempt order by Judge Waddy indicates that courts may respond to situations in which adequate legislation is the basis for inadequate implementation.

While P.A.R.C. and Mills are similar in many ways, each has an essential message for those attempting to articulate or to enforce the rights of exceptional children to an education

suited to their needs. P.A.R.C. proclaims that all mentally retarded children can benefit from an education of a suitable nature. Mills declares that: parents have a right to be informed of placement plans and the reasons therefore before the fact of placement; that they have a right to a hearing by an independent hearing officer, including the right to legal counsel, as well as a record of the hearing and the right to inspect their child's records; and finally, that lack of funds will not be accepted by this court, at least, as justification for the denial of an opportunity for an education to an exceptional child.

It appears, then, that the rights of handicapped children to an appropriate education are well on their way to becoming a fundamental responsibility of school administrators and state officials. To many, the movement seeking recognition of the right to equal educational opportunities for exceptional children is the natural outgrowth of the landmark decision of Brown v. Board of Education, 347 U.S. 483, 493 (1954), in which the Supreme Court stated:

> "Today, education is perhaps the most important function of the state and local governments...it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

The example of Thomas Andrews and the efforts of those working on his behalf demonstrate the practical problems faced by both the school personnel and the legal profession -- all of whom no doubt share a deep concern for the education of the exceptional child -- in the implementation of a court decree. All can agree that the exceptional child is entitled to or even guaranteed a right to a suitable education and that this right is one guaranteed by the Constitution. But, the problem remains to haunt all of us that:

> "A given constitution demands an education in conformity with it."

Aristotle may not have had the last word on this subject, but he probably had the first. We ignore him at our peril.